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No. 06-1209

In The

Supreme Court of the United States

JOHN WASHINGTON HIGHTOWER,

Petitioner,

v.

WILLIAM TERRY, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
*CHRISTINA A. SWARNS
JENIGH J. GARRETT
HOLLY A. THOMAS
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(212) 965-2200

Attorneys for *Amicus Curiae*

*Counsel of Record

Motion for Leave to File Brief of the NAACP Legal Defense and Educational Fund, Inc. As *Amicus Curiae* Supporting Petitioner

The NAACP Legal Defense and Educational Fund, Inc., (hereinafter "LDF")*, respectfully moves, pursuant to Supreme Court Rule 37.2(b), for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari in this matter. (Petitioner has consented to the filing of this brief but Respondent has declined to consent.)

The Petition in this matter centers on the correct application of this Court's precedents in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Miller El v. Dretke*, 545 U.S. 231 (2005). Mr. Hightower was convicted and received a death sentence following a trial conducted (including the jury selection process) by a Georgia prosecutor who had a documented history of racial discrimination in the jury selection process (*see Amadeo v. Zant*, 486 U.S. 214, 228 (1988)). The Petition sets forth, in detail, the factual basis for the claim that this prosecutor exercised peremptory challenges in violation of *Batson* and *Miller-El, v. Dretke,* 545 U.S. 231 (2005) and the conflict among the federal Courts of Appeals and state courts concerning the role of comparative juror analysis in applying those precedents.

LDF focuses, in its proposed brief as *Amicus Curiae*, on the infirmities of the "implicit finding" approach announced by the court below as a substitute for undertaking the comprehensive review of the record required by the third step of the *Batson* procedure. LDF's proposed *amicus* brief argues that there is a fundamental contradiction between the "implicit finding" approach and the objectives that shaped both this Court's holding in *Batson* and its consistent application and

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*LDF's interest in this matter is set forth at pp. 1-2 of its proposed Brief as *Amicus Curiae, infra.*

elaboration of that holding in subsequent decisions. LDF's proposed *amicus* brief therefore is not duplicative of the Petition but supplements it by demonstrating how the "implicit finding" approach hinders, rather than facilitates, the identification and eradication of discrimination in jury selection through the exercise of peremptory challenges.

For the above reasons, we respectfully request that the Court grant leave to file the attached brief *amicus curiae*.

Respectfully submitted,

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
*CHRISTINA A. SWARNS
JENIGH J. GARRETT
HOLLY A. THOMAS
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(212) 965-2200

Attorneys for proposed *Amicus Curiae*

*Counsel of Record

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Interest of *Amicus Curiae*[*]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation chartered by the Appellate Division of New York Supreme Court as a legal aid society, formed to assist African Americans in securing their rights by the prosecution of lawsuits. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on jury selection in particular. LDF has represented defendants in numerous jury selection cases before this court including, *inter alia, Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana* 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973); pioneered the affirmative use of civil actions to end jury discrimination in, *Carter v. Jury Comm'n of Greene County*, 396 U.S. 320 (1970), and *Turner v. Fouche*, 396 U.S. 346 (1970); and appeared as *amicus curiae* in *Miller-El v. Dretke*, 545 U.S. 231 (2005), *Johnson v. California*, 545 U.S. 162 (2005), *Miller-El v. Cockrell*, 537 U.S.322 (2003), *Georgia v. McCollum*, 505 U.S. 42 (1992), *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

Because of its long-standing commitment to the elimination of racial discrimination in the criminal justice system and expertise in discrimination in the jury selection process, LDF has an interest in these appeals, which present important issues concerning the application of *Batson* and its progeny, and believes its perspective would be helpful to this Court in resolving the issues presented in this case.

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[*] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief. A letter from counsel for Petitioner consenting to the filing of this brief has been filed with the Clerk of the Court pursuant to Supreme Court rule 37.3(a). As indicated in the Motion for Leave to File submitted herewith, Respondent has withheld consent to the filing of this brief.

I. Introduction and Summary of Argument

Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, are critical tools in the struggle for race-neutral jury selection. In *Batson*, this Court recognized that peremptory challenges cannot be reconciled with the demands of the Fourteenth Amendment if they remain insulated from scrutiny in the face of *prima facie* evidence of racial discrimination. This Court therefore established a three-step test for ferreting out discrimination: first, defendants must present a *prima facie* case of discrimination, *id.* at 93-97; then, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors," *id.* at 97; and, lastly, the trial court "will have the duty to determine if the defendant has established purposeful discrimination," *id.* at 98.

This Court's precedent has made clear that each step of the *Batson* inquiry is critical to preventing racial discrimination. Step one gives the defendant a mechanism to expose discrimination and protects the historical prerogative of the peremptory challenge. Step two gives the prosecutor the chance to defend his/her challenge against *prima facie* evidence of discrimination. At step three, "the court determines whether there is intentional discrimination by "assess[ing] the plausibility of [the proferred] reason[s] in light of all evidence with a bearing on [them]." *Miller-El v. Dretke*, 545 U.S. 231, 252 (2005).

In Mr. Hightower's case, the courts applied only the first two steps of *Batson*. No court has undertaken the critical third step of the *Batson* inquiry and no court has determined whether or not purposeful discrimination actually occurred. By failing to subject the facts of *Hightower* to this critical analysis, the courts shielded, rather than exposed, discrimination in Mr. Hightower's jury selection process.

II. History of Discrimination in Jury Selection

This Court has "consistently and repeatedly reaffirmed" the principle that the Constitution of the United States prohibits racial discrimination by the State at *any stage* of the jury selection process. *See Miller-El*, 545 U.S. at 238 (quoting *Georgia v. McCollum*, 505 U.S. 42, 44 (1992)); *see also Strauder v. West Virginia*, 100 U.S. 303 (1880); *Swain v. Alabama*, 380 U.S. 202 (1965); and *Batson v. Kentucky*, 476 U.S. 79 (1986). The harm inflicted by the state's use of race as a basis for excluding otherwise qualified jurors extends not only to the defendant, who has a right to a trial free of racial discrimination, but also to each excluded juror and the community-at-large. *See Strauder*, 100 U.S. at 308 (exclusion from jury service "is practically a brand upon [the potential jurors], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others."); *Batson*, 476 U.S. at 86-87 (quoting *Strauder*, 100 U.S. at 309) (the defendant is "denie[d] . . . the protection that a trial by jury is intended to secure" – the "right[s] under the Fourteenth Amendment to 'protection of life and liberty against race or color prejudice.'"); *Miller-El v. Dretke*, 545 U.S. 231, 238 (2005) (quoting *Powers v. Ohio*, 499 U.S. 400, 412 (1991)) ("When the government's choice of jurors is tainted with racial bias, that 'overt wrong . . . casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial,' . . .'invites cynicism respecting the jury's neutrality,' and undermines public confidence in adjudication.")(citations omitted).

Notwithstanding this Court's condemnation of racial discrimination in jury selection, prior to 1986 there was no workable means of challenging the discriminatory use of peremptory challenges. Legal standards prior to *Batson* imposed such a high burden on petitioners claiming

discrimination that, notwithstanding the constitutional prohibition, African Americans were still intentionally excluded from jury service. *See Miller-El*, 545 U.S. at 239 ("mak[ing] out a continuity of discrimination over time . . . turned out to be difficult to the point of unworkable, and . . . [rendered] prosecutors' use of peremptories largely immune from constitutional scrutiny.") (internal quotation marks omitted); *Batson*, 476 U.S. at 103 (Marshall, J., concurring) (after *Swain* "[m]isuse of the peremptory challenge to exclude black jurors has become both common and flagrant."). Without a critical inquiry into the reasons for seemingly discriminatory peremptory challenges, the constitutional protections of the Fourteenth Amendment were "vain and illusory." *Batson*, 476 U.S. at 98; *see also McCray v. New York*, 461 U.S. 961, 964 n.1 (1983) (Marshall, J., dissenting from denial of certiorari).

III. Each of *Batson*'s Three Steps is Critical to Exposing and Eliminating Unconstitutional Discrimination

In light of the continuing phenomenon of racial discrimination in jury selection, in *Batson* this Court declared that the right to the peremptory challenge could not be reconciled with the right to equal protection if peremptory strikes that appeared to be the product of intentional racial discrimination were allowed to go unchallenged. 476 U.S. at 86-87. The Court therefore concluded that insofar as "tension exist[ed] between the 'old tradition' of unconsidered preference for unfettered use of peremptory challenges and the . . . meaningful safeguards against invidious application of racial stereotypes, then the latter consideration must prevail." *Jones v. Ryan*, 987 F.2d 960, 968 (3rd Cir. 1993). Instead of finding peremptory challenges unconstitutional, however, this Court created a straightforward test for exposing and eliminating unconstitutionally race-based peremptory challenges: first, the defendant must present a *prima facie* case of discrimination,

Batson, 476 U.S. at 96; then, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors," *id.* at 97; and, finally, the trial court "will have the duty to determine if the defendant has established purposeful discrimination," *id.* at 98, by "assess[ing] the plausibility of [the proferred] reason[s] in light of all evidence with a bearing on [them]." *Miller-El*, 545 U.S. at 252. Each of *Batson*'s three steps have distinct purposes and each is independently critical to uncovering discrimination in the exercise of peremptory challenges. *See generally Purkett v. Elem*, 514 U.S. 765 (1995); *Miller-El v. Dretke*.

A. Step One: Establishing a *Prima Facie* Case

The first step of the *Batson* test serves two functions: (1) it preserves the peremptory nature of the challenge by requiring a defendant to make a threshold showing of discrimination before a prosecutor is required to explain his/her strikes; and (2) it rectifies the problem created by *Swain* in imposing a reasonable – not "onerous" – threshold burden on defendants claiming discrimination. *See Johnson v. California*, 545 U.S. 162, 170 (2005). Thus, a defendant claiming discrimination in the exercise of peremptory challenges must first "produc[e] evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.* In so doing, the defendant is entitled to rely upon the "totality of the relevant facts" including "evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial," such as evidence of "disproportionate impact" or other "circumstantial and direct evidence of intent" such as "the prosecutor's questions and statements during voir dire examination and in exercising his challenges," or that "in the particular jurisdiction members of his race have not been summoned for jury service over an extended period of time." *Batson*, 476 U.S. at 93-96 (citations and quotations omitted).

B. Step Two: Race-Neutral Explanation for Strikes

Step two affords the prosecutor an opportunity to defend his/her strikes against the *prima facie* evidence of intentional discrimination. To meet this burden, the prosecutor need only proffer a *facially neutral* – not persuasive or plausible – explanation for her strikes. *See Purkett*, 514 U.S. at 768. "'Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral'" and the prosecutor will have met his step two burden. *Id.* (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

C. Step Three: Proving Intentional Discrimination.

At step three of the *Batson* analysis, the court finally decides whether purposeful discrimination has taken place. In determining whether the challenged strikes were discriminatory, courts can and should examine not only the evidence proffered at step one, but also the explanations offered by the prosecutor at step two. It is at this third step, therefore, that "the persuasiveness of the [prosecutor's] justification becomes relevant" and "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U.S. at 768.

In determining whether or not proffered explanations are pretextual, the trial court can consider such evidence as "side-by-side comparisons of . . . black venire panelists who were struck and white panelists allowed to serve," prosecutorial mischaracterizations of stricken jurors' testimony, statistical evidence regarding how many jurors have been struck, the prosecutor's "failure to engage in any meaningful voir dire examination on a subject the State alleges it is concerned about," disparities in the use of peremptory strikes, disparate questioning, historical evidence of discrimination, and "broader patterns of practice during the

jury selection." *Miller-El*, 545 U.S. at 240-41, 244, 246, 254. With this analysis, the trial court has the capacity to look beyond the facial neutrality of the prosecutor's explanation and determine whether the proffered reasons are pretexts for intentional discrimination. *See Purkett*, 514 U.S. at 767-68, 772, *Batson*, 476 U.S. at 96-98.

The third step is critical because it ensures that the justice system does not exalt form over substance by allowing the assertion of "'neutral explanations' which are no more than facially legitimate, reasonably specific and clear" to be equivalent to a finding of no discrimination. *Purkett*, 514 U.S. at 773 (Stevens, J., dissenting) (quotation omitted). "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*" and the existence of any "comprehensible" and facially non-discriminatory reason would shield intentional discrimination. *Miller-El*, 545 U.S. at 240-45. *See also Johnson v. Vasquez*, 3 F.3d 1327, 1331 (9th Cir. 1993) ("When there is reason to believe that there is a racial motivation for the challenge, *neither the trial courts nor we are bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it.* Any other approach leaves *Batson* a dead letter.") (emphasis added). This fact is abundantly demonstrated by the existence of the myriad cases finding that proffered race-neutral reasons were actually pretexts for intentional discrimination.[1] *See also McDonnell Douglas*

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[1] *See, e.g.*, *Miller-El*, 545 U.S. at 241-48 (concluding that comparative juror analysis revealed that the prosecutor's reasons for striking black jurors were undercut by the prosecutor's failure to strike similarly situated white jurors); *Kesser v. Cambra*, 465 F.3d 351, 360 (9th Cir. 2006) (granting the inmate's habeas petition after finding that "an evaluation of the voir dire transcript and juror questionnaires clearly and convincingly refutes each of the prosecutor's nonracial grounds . . . ."); *Riley v. Taylor*, 277 F.3d 261, 279-80 (3d Cir. 2001) (granting a habeas petition after finding that a prosecutor's reasons for striking one juror were "entirely unsupported by the

Corp. v. Green, 411 U.S. 792, 804 (1973) (explaining that other evidence can show that "presumptively valid reasons . . . were in fact a coverup for a racially discriminatory decision").

Thus, an actual examination of the credibility of the proffered explanations in the face of the totality of the evidence and all relevant circumstances is necessary to ensure that peremptory strikes "do[] not deny equal protection." *Purkett*, 514 U.S. at 769.

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record," and that there was "little basis for distinguishing" another black juror who was struck from a white juror who served without challenge); *Ford v. Norris*, 67 F.3d 162, 169 (8th Cir. 1995) (granting a habeas petition after finding that a black potential juror's "unqualified answers to the prosecutor's questions concerning the death penalty [were] much stronger than responses given by several other white jurors that the prosecutor chose not to strike. A prosecutor's failure to apply a stated reason for striking black jurors to similarly situated white jurors may evince a pretext for excluding jurors solely on the basis of race . . . ."); *Splunge v. Clark*, 960 F.2d 705, 708-09 (7th Cir. 1992) (affirming district court's grant of habeas petition when the "prosecutor's explanation was insufficient to rebut [the defendant's] prima facie case regarding the challenge exercised against [a black juror]. The record reveals no evidence whatsoever that [the juror] did not understand the standard of proof to be applied in a criminal case--the reason now advanced for upholding her exclusion," and that "non-black potential jurors who answered the [standard of proof] question identically were deemed fit for jury service."); *George v. State*, 588 S.E.2d 312, 316-18 (Ga. Ct. App. 2003) (finding that record evidence contradicted the prosecutor' race-neutral justification); *White v. State*, 572 S.E.2d 70, 73 (Ga. Ct. App. 2002) (reviewing the voir dire transcript and finding contradictions between the proffered justification and the record).

IV. Because the Purpose and Focus of *Batson*'s Second and Third Steps are Substantively Different, the Eleventh Circuit Erred in Treating the *Hightower* Trial Court's Acknowledgment of the Facial Neutrality of the Prosecutor's Proffered Reasons as a Finding – "Implicit" or Otherwise – that the Prosecutor did not Discriminate.

Because, as detailed above, both the purpose for and the evidentiary requirements of *Batson*'s second and third steps are substantively different, a finding that the prosecutor's proffered explanations are facially neutral (step two) can never be equivalent to a finding that the prosecutor did not discriminate (step three). Indeed, this Court has explicitly rejected such an analysis and emphasized the fact that *Batson* requires courts to look beyond the facial neutrality of proffered explanations to assess the existence of racial motivation.

In *Purkett*, this Court reversed the Eighth Circuit's finding of a *Batson* violation where the appellate court concluded that the trial prosecutor failed to meet his step two burden because his proffered race-neutral explanations were implausible and therefore pretextual. In holding that the panel improperly conflated steps two and three of the *Batson* test, this Court declared that *Batson* does not hold that "a trial judge *must terminate* the inquiry at step two when the race-neutral reason is silly or superstitious" because such a holding would "violate[] the principle that the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768. Thus, *Purkett* reiterated the critical distinction between *Batson* steps two and three and, in particular, the fact that the duty to prove racial motivation first occurs at step three.

In declaring that *Batson* requires lower courts to specifically assess the existence of racial motivation at step three, *Purkett* also dictates that *Batson* prohibits courts from

construing the existence of a race-neutral reason as dispositive proof that the prosecutor did not discriminate, because such a conclusion similarly ignores the question of whether there exists evidence of racial motivation (*Batson* step three). *See Hardcastle v. Horn*, 368 F.3d 246, 259 (3d Cir. 2004) ("[t]he Pennsylvania Supreme Court's decision does not indicate that the court engaged in any analysis or consideration of the credibility of the potential justifications that it had proffered. Rather, the court's decision reads as if the court accepted the justifications at face value. . . Accordingly, . . . we lack an adequate step three analysis to which we may defer.") (quotation omitted); *United States v. Alanis*, 335 F.3d 965, 969 (9th Cir. 2003) ("It is not enough that the district court considered the government's gender-neutral explanations 'plausible.' Instead, it is necessary that the district court make a deliberate decision whether the purposeful discrimination occurred"). Equating the proffer of a race-neutral reason with a finding of no intentional discrimination contradicts *Batson* and *Purkett* and undermines *Batson*'s intended goal of exposing and eliminating unlawful discrimination and is, therefore, constitutionally unacceptable. *See Miller-El*, 545 U.S. at 240 ([i]f any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*.").

Notwithstanding *Purkett*, the previously described history of *Batson*, and the distinct purpose and requirements of each of *Batson*'s three steps, in this case the courts below erroneously interpreted an affirmation of the neutrality of the trial prosecutor's strikes as a finding of no intentional discrimination. Because this analysis is constitutionally erroneous, this Court should grant *certiorari* and reverse.

Mr. Hightower's trial counsel made a *Batson* objection after the prosecutor used his peremptory strikes to exclude 6 of the 7 African American potential jurors. After the prosecutor

offered race-neutral reasons for the strikes – claiming that he struck some jurors because of their opinions on the death penalty and others because they had relatives who had been involved in criminal activity – the trial court simply ended the inquiry. Specifically, after hearing the prosecutor's purportedly race-neutral rationales, the trial court repeatedly and summarily stated, "I find that you have stated an articulable reason for striking [juror's name] and that reason is not race related." *See* T. 620, 621, 623, 624. At the conclusion of the *Batson* hearing, the trial court stated: "Okay, ladies and gentlemen, after hearing the defendant's motions under *Batson* I find that the defendants have failed to establish a prima facie case of discrimination on the part of the district attorney.[2] I further find that as to each individual strike, the State has presented an articulable, nonrace related reason for striking the prospective juror." T. 626.

Notwithstanding the fact that the trial court clearly addressed only steps one and two of the *Batson* test, the Eleventh Circuit majority rejected Hightower's claim of *Batson* error and concluded that the trial court made an "implicit" finding of no intentional discrimination (step three). *Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006). Specifically, the Eleventh Circuit declared that "a trial court's dispositive ruling may contain implicit findings, which, though unstated, are necessary to that ruling." *Id.* As such, "[t]he trial court's overruling of Hightower's *Batson* objection would have

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[2] This finding was clearly incorrect, as the prosecutor's striking of 6 out of 7 black jurors clearly constituted facts which raise an inference of discrimination. Nevertheless, the trial court's finding that Mr. Hightower had failed to make out a prima facie case is, at this stage, irrelevant. As this Court held in *Hernandez v. New York*, 500 U.S. 352, 359 (1991), "Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."

defied logic had the court disbelieved the prosecutor's race-neutral explanations." *Id.* Thus, the Eleventh Circuit concluded that the trial court's specific acknowledgment of the neutrality of the prosecutor's proffered explanations was the functional equivalent of a finding that the trial prosecutor did not discriminate. This analysis must be rejected under both *Purkett* and *Batson*.

As previously indicated, in *Purkett* the Eighth Circuit found that the prosecutor failed to meet his step two burden because his proffered race-neutral reason was irrelevant to the case and therefore pretextual. *Purkett*, 514 U.S. at 766. Under the "implicit finding" theory adopted below, this Court should have affirmed the Eighth Circuit's decision by (a) ignoring both the fact that its opinion addressed only step two and also the fact that *Batson* dictates that steps two and three have distinct evidentiary requirements, with step two looking only to neutrality and step three addressing persuasiveness, and (b) concluding that by finding *Batson* error, the Eighth Circuit must have made an "implicit" step three analysis. This Court did not, however, adopt such reasoning. Instead, it rejected the lower court's decision by applying to the Eighth Circuit's recitation of the facts of *Purkett* the analysis required by *Batson*'s second and third steps – and concluding that the Court of Appeals erred. *See Purkett*, 514 U.S. at 767-68.

It is likely that this Court chose not to apply "implicit finding" analysis to its review of the Eighth Circuit's decision in *Purkett* because doing so would have thwarted *Batson*'s goal of maintaining the right of the peremptory challenge absent evidence of discrimination by allowing reviewing courts to *assume*, without adequate proof, the existence of intentional discrimination.

The Eleventh Circuit should have applied the analysis adopted by this Court in *Purkett* to its review of the trial court's decision in *Hightower*. Thus, instead of *assuming*, via

"implicit finding," the non-existence of discrimination from the trial court's acknowledgment of the neutrality of the prosecutor's explanations, the Eleventh Circuit should have examined the trial court's decision with an eye toward determining whether there was any evidence indicating that the trial court conducted the specific analyses which are constitutionally required by steps two and three of *Batson*. Because the record is clear that the trial court stopped its analysis at step two, the Eleventh Circuit should have found that the trial court's decision was contrary to *Batson* and reversed.

By using "implicit finding" analysis to justify ignoring the explicit language of the trial court's decision (which only makes findings as to steps one and two) and *Batson*'s clear and intentional distinctions between the second and third steps, the Eleventh Circuit undermined *Batson*'s goal of exposing and eliminating discrimination by allowing the existence of "any facially neutral reason" to "suffice[] to answer a *Batson* challenge." *Miller-El*, 545 U.S. at 240.

For this reason, the Eleventh Circuit's "implicit finding" analysis must be rejected and this Court should grant *certiorari* and reverse.

V. Had the Lower Courts Conducted a Proper Step Three Analysis, They Would Have Found that Hightower's Trial Prosecutor Intentionally Used his Peremptory Challenges to Exclude Otherwise Qualified African-American Potential Jurors.

By improperly stopping its analysis at step two, the trial court (and the state and federal courts that affirmed the trial court's decision) undermined *Batson*'s power to uncover racial discrimination in jury selection. Had the trial court – or, indeed, any court – gone beyond an examination of the facial neutrality of the prosecutor's proffered reasons and conducted

an actual step three analysis of whether those reasons stood up against the record, it would have found that the prosecutor's rationales were clearly pretextual.

A. Familial Relationships

The trial prosecutor asserted that he struck the following African-American potential jurors in part because of their relatives' involvement in crime: Thelma Butler, Ricky Thomas, Lucious Boswell, and Mattie Harris. The record demonstrates that these reasons are pretextual because the trial prosecutor *accepted* similarly situated white jurors or failed to question the African-American potential jurors on the effect of the familial relationships at issue. *See Miller-El*, 545 U.S. at 241 ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."); *id.* at 249 n.8 (where a prosecutor strikes potential jurors because of family involvement in crime, "the failure to ask undermines the persuasiveness of the claimed concern.").

1. Similar Crime Committed by Relative

The prosecutor stated that African-American potential juror, Ricky Thomas' "father was convicted for killing his mother when Ricky Thomas was eight years old. He came back after he served whatever time he had to serve, he came back home and raised his children. There's obviously a possibility that Ricky Thomas would identify in this case and compare this case with his father's case and compare what his father has meant to him since he come home." T. 619.[3]

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[3] The only similarity between the facts of *Hightower* and the crime that Mr. Thomas' father committed was that it involved a family member. Mr. Thomas was not the victim of a crime, nor did Mr. Thomas testify to the facts of his father's case. The tenuous similarity that the prosecutor attempted to raise ends there.

The record demonstrates, however, that a white potential juror, Michael Anthony Hensler, "was charged with voluntary manslaughter back in '69 and found guilty of it." T. 70. Although the date of Mr. Hensler's *own crime* – 1969 – was clearly in the same time frame as the events in Mr. Thomas' life,[4] the prosecutor accepted Mr. Hensler and Mr. Hensler served on the jury that convicted Mr. Hightower.

These facts fatally undermine the trial prosecutor's explanation for his strike of African American potential juror Ricky Thomas and strongly support the conclusion that it was pretextual.

2. Previous Interaction Between Prosecutor and Members of the Venireperson's Family

The trial prosecutor claimed that he used peremptory strikes against African-American potential juror Lucious Boswell because he was the "*brother of the wife*" of a man he prosecuted; against African-American potential juror Thelma Butler because she was the "*sister of the wife*" of a man he had prosecuted twelve years before; and against African-American potential juror Mattie Harris because "[h]er *son* has to be locked up frequently, but she does not want him punished," and that her *daughter* was "convicted and imprisoned for drugs." T. 620, 621, 623 (emphasis added).

The failure of the trial prosecutor to ask these potential jurors *anything* about the supposed crimes of these close or distant relatives "undermines the persuasiveness of the claimed concern." *Miller-El*, 545 U.S. at 249 n.8. *See also United*

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[4] Mr. Thomas, when questioned, stated that he knew that his father had killed his mother, T. 70-71, but stated that it was "back in '60 something. I was too young to remember." T. 71. When the prosecutor pressed him, asking, "You don't have any memory of that circumstance at all?," Mr. Thomas replied, "No." T. 71.

States v. Solis Jordan, 223 F.3d 676, 686-87 (7th Cir. 2000) ("One of the government's objections to [a] juror was that he was fluent in Spanish . . . . The government expressed the concern that the juror might refuse to defer to the government's translations. . . . The district court did not accept this explanation, because the government failed to question the Spanish-speaking venirepersons about their willingness to defer to expert witnesses' translations of the tape. We agree with the district court on this particular point."); *Murphy v. Dretke*, 416 F.3d 427, 434 (5th Cir. 2005) (noting that, "While the prosecution's reasons for peremptorily challenging venireperson Cellars were valid, its failure to ask similar questions of venireperson LaDonna Smith, who appeared similarly situated, does raise an inference of pretext."); *Williams v. State*, 426 S.E.2d 348, 349 (Ga. 1993) (reversing and remanding for a new trial after finding that a prosecutor's purported concerns over black potential jurors ability to apply the death penalty "was not explored by the state beyond standard questions concerning the death penalty...."); *see also United States v. Horsley*, 864 F.2d 1543, 1545-46 (11th Cir. 1989) ("[After the prosecutor has come forward with a race-neutral explanation for the strikes,] [t]he trial court . . . must decide *on the basis of all the evidence* whether a denial of equal protection will result if it overrules the defendant's objection to the prosecutor's exercise of the challenge.") (emphasis added).

B. Opinions Regarding the Death Penalty

The prosecutor sought to justify his strikes of potential African-American jurors Lucious Boswell, Emerson Davis, Norman Mack, and Mattie Harris, and alternate Lynette Davis by claiming that their attitudes about the death penalty rendered them unsuitable. However, the record suggests that this explanation was also pretextual because the prosecutor mischaracterized the statements of Emerson Davis and Norman

Mack and because numerous white jurors who were *accepted* by the prosecutor expressed ambivalence about the death penalty. *See Miller-El*, 545 U.S. at 244 (noting, with respect to the prosecutor's mischaracterization of the testimony of an African-American potential juror: "[p]erhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [the African-American potential juror] off the jury we think he would have proceeded differently.").

The trial prosecutor mischaracterized the testimony of African-American potential jurors Emerson Davis and Norman Mack. Specifically, the prosecutor asserted that "Mr. Davis said that he was somewhat opposed to the death penalty. As compared to other people we had on that question about the death penalty, he was undesirable from that point of view" and that "Mr. Mack . . . contradicted himself on the death penalty. At first he said that he was conscientiously opposed, then upon further questioning said that he was somewhat in favor and then he said that he was conscientiously opposed under some circumstances. [T]here is no way for us to explore under what circumstances he was conscientiously opposed." T. 622, 624.

Contrary to the prosecutor's assertions, the record reveals that when Mr. Mack was initially asked whether he was conscientiously opposed to the death penalty, he said, "[i]t depends on the circumstances." He went on to make clear that "there are certain circumstances in which [he] could vote for a death penalty," that "in some cases . . .a death penalty would be suitable," and, on a scale of "strongly in favor," "somewhat in favor," "somewhat opposed," or "strongly opposed" to the death penalty. Mr. Mack indicated that, overall, he was "somewhat in favor." T. 254, 311-312.

Mr. Davis, on the other hand, clearly answered "No" when he was asked whether he was opposed to the death penalty. T. 344. Mr. Davis also stated that he felt that people charged with murder were treated "fairly," and when asked

whether he was "strongly in favor," "somewhat in favor," "somewhat opposed," or "strongly opposed" to the death penalty, Mr. Davis stated "somewhat." T. 386-88. At no point did Mr. Davis ever indicate that he was opposed to the death penalty.

Notably, Mr. Davis' and Mr. Mack's actual responses were not unlike those of several white jurors who were *accepted* by the prosecution. John Hutcheson testified that while he supported the death penalty, he would vote for life, depending on the circumstances. T. 388-89. Gary Pritchett stated that "every case doesn't deserve capital punishment. There's going to be some cases that they deserve life imprisonment." T. 214. Karen Gillespie stated that while she believed there were some crimes for which the death penalty was very appropriate, "sometimes . . . there would be circumstances where a life sentence was appropriate." Merrick Carter testified that he would "have to hear the case" to decide between life imprisonment and the death penalty. T. 215. None of these white veniremembers was challenged by the prosecutor.

Had the trial court properly conducted a step three inquiry, it would have realized that the trial prosecutor misrepresented the statements of Davis and Mack, and that their responses were similar to those given by white jurors, and would have concluded that the trial prosecutor's explanations were pretextual.

Comparative juror analysis also indicates the pretextual nature of the prosecutor's claim that he struck the African-American potential jurors out of concern about their support for the death penalty. The prosecutor stated that he struck African-American potential juror Lucious Boswell because "in response to the question about whether he thought that someone who had been convicted of killing three people should be sentenced to death, his response was, no, I think he ought to be allowed

to work it out in prison" and that he struck African-American potential juror, Mattie Harris, because she "said she felt that the fact the defendant had killed three people means he is sick and needs help." T. 620, 621. However, the record reflects that many white jurors *who were accepted by the prosecutor* similarly indicated that life imprisonment could be a fair sentence and/or that the decision to impose capital punishment would depend on the circumstances. *See* T. 103, 104, 108, 213, 214, 215, 217, 218, 219, 221, 229, 305, 208, 389, 391.

Batson's promise is hollow if it means that the trial court's examination is over once a prosecutor offers a rationale for her strikes that is race-neutral but, in the face of the record, implausible. *See Kesser v. Cambra*, 465 F.3d at 358 ("[T]he California courts, by failing to consider comparative evidence in the record before it that undeniably contradicted the prosecutor's purported motivations, unreasonably accepted his nonracial motives as genuine."). As Judge Wilson put it in his dissenting opinion below, "By rejecting Hightower's *Batson* claim merely because the prosecutor's justifications were 'articulable' and 'nonrace related,' the Georgia courts' adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of,' *Batson*." *Hightower v. Terry*, 459 F.3d at 1075(Wilson, J., dissenting).

VI. Conclusion

The strong evidence of pretext in the trial record described in the preceding section forcefully demonstrates why the truncated *Batson* analysis employed by the lower courts in this case is inadequate and leads to constitutional error. We respectfully urge this Court to affirm the fact that race discrimination has no place within jury selection, and to emphasize that lower courts must apply all of *Batson*'s steps to root out discrimination. If uncorrected, the type of decision-making that occurred in *Hightower* will herald a return to a time before *Batson* when racial discrimination in jury selection was rampant and there existed no meaningful opportunity to expose and eliminate it. This Court should grant *certiorari* and reverse summarily.[5]

Respectfully submitted,

THEODORE M. SHAW
Director-Counsel
JACQUELINE A. BERRIEN
*CHRISTINA A. SWARNS
JENIGII J. GARRETT
HOLLY A. THOMAS
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street, Suite 1600
New York, NY 10013-2897
(212) 965-2200

Attorneys for *Amicus Curiae*
*Counsel of Record

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[5]Given the strong reaffirmation of *Batson*'s three-step analysis by this Court in *Miller-El* and the prior remand of this very case for reconsideration by the court below in light of *Miller-El*, summary disposition is merited.